Deutsche Telekom
North America

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

September 5, 1997

IB Docket No. 96-111

Dear Mr. Caton:

Enclosed for filing please find an original and nine copies of the Comments of Deutsche Telekom AG in the above matter.

Sincerely,

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cc: International Transcription Services, Inc.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Regulatory Policies to Allow non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States	)	IB Docket No. 96-111
	)	CC Docket No. 93-23
and	)	
	)	
Amendment of Section 25.131 of the Commission's Rules and Regulations to Eliminate the Licensing Requirement for Certain International Receive-Only Earth Stations	)	RM-7931
	)	File No. ISP-92-007
and	)	
	)	
Communications Satellite Corporation	)	
	)	
Request for Waiver of Section 25.131(j)(1) of the Commission's Rules As It applies to Services Provided via the INTELSAT K Satellite	)	

REPLY COMMENTS OF DEUTSCHE TELEKOM AG AND DEUTSCHE TELEKOM, INC.

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SUMMARY

Deutsche Telekom AG and Deutsche Telekom, Inc. (collectively "DT") support the FCC's proposal to adopt a more open entry policy for satellite systems licensed in non-U.S. WTO member countries. However, DT strongly opposes the introduction of any kind of public interest test that considers whether market entry by foreign satellite systems would create a risk to competition in the U.S. satellite market. The WTO Basic Telecom Agreement should be implemented in a way that ensures unrestricted open entry for WTO satellite systems.

The FCC's Further Notice gives rise to concern since the proposed rebuttable presumption will not guarantee market access to non-U.S. WTO satellite systems. Rather, it will cause disputes regarding the consequences of the market entry of a non-U.S. WTO satellite system for the competitive situation in the United States. The examination of these consequences by the FCC and the duration and complexity of such a proceeding will serve to deter foreign systems operators from attempts to enter the U.S. market. Thus, instead of removing existing market access barriers, the FCC will create new impediments for non-U.S. WTO satellite systems.

Finally, it is important that the FCC acknowledge the market access commitments made by numerous members of Intergovernmental Satellite Organizations ("IGOs"). Therefore, the FCC has to create a viable option for access to the U.S. satellite market by these organizations. Also, the FCC should recognize that IGO affiliates are to be treated like any other private company offering satellite services. Thus, the FCC may not adopt any additional tests or analyses when assessing the market entry of an IGO affiliate.

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TO: The Commission

REPLY COMMENTS OF DEUTSCHE TELEKOM AG AND DEUTSCHE TELEKOM, INC.

Deutsche Telekom AG and Deutsche Telekom, Inc. (collectively "DT") hereby submit these comments in response to the Further Notice of Proposed Rulemaking (FCC 97-252) ("Further Notice") released by the FCC on July 16, 1997. The Further Notice seeks additional comment on a proposed framework to allow satellites licensed by other countries to provide service in the the United States. This framework was originally proposed by the Commission in a Notice of Proposed Rulemaking (FCC 96-210) issued on May 14, 1996, in its DISCO II proceeding ("DISCO II Notice"). In the Further Notice, the Commission incorporates the results of the WTO Basic Telecom Agreement that goes into effect on January 1, 1998. The

Further Notice is part of the process of implementating the WTO Basic Telecom Agreement in the United States.

I. INTRODUCTION

DT agrees with the Commission that the ECO-Sat Test as proposed in the DISCO II Notice should not be applied to non-U.S. satellite systems licensed in countries that signed the WTO Basic Telecom Agreement. However, DT objects to the Commission's proposal that applications by these satellite systems should be denied access to the U.S. satellite market if a third party shows that granting access would "pose a very high risk to competition in the United States satellite market." Further Notice at ¶ 18. With this proposal, the application of every satellite system that under the WTO Basic Telecom Agreement should enjoy free market access in WTO member countries would be placed at the mercy of its competitors. It is easy to imagine that in a market as competitive as the worldwide satellite market many companies would grasp the opportunity to either keep a competitor out of the U.S. market or at least substantially delay its market entry by asserting that a "very high risk to competition" would result from the competitor's entry into the U.S. market. Thus, the proposal is an obvious violation of the spirit of the WTO Basic Telecom Agreement and is incompatible with central principles of the General Agreement on Trade in Services ("GATS"), such as the Most Favored Nation clause or the National Treatment principle.

II. THE FCC SHOULD NOT ADOPT AN ECO-SAT TEST FOR SATELLITE SYSTEMS LICENSED IN WTO MEMBER COUNTRIES

In its DISCO II Notice, the Commission proposed a basic framework for evaluating applications for access to non-U.S. satellites to serve the United States. DISCO II Notice at ¶ 18. To grant such application, the Commission would have to find "effective competitive

opportunities" for U.S. satellite operators in the "home market"[1] of the non-U.S. satellite and in some or all of the "route markets" that the non-U.S. satellite seeks to serve from earth stations in the United States. Id. at ¶ 18. In this context, the Commission proposed to examine both de jure and de facto market entry barriers to U.S. satellite operators in the foreign markets. Id. at ¶ 37.

In the Further Notice, the Commission revisits its proposal in light of the WTO Basic Telecom Agreement. The Commission states that the WTO Basic Telecom Agreement will substantially advance the goal of promoting competition in the global satellite services market. Further Notice at ¶ 13. Consequently, the Commission proposes to forego an ECO-Sat analysis for applications from satellite systems licensed in WTO member countries ("WTO satellite systems"). Id.

DT agrees with the Commission that the application of a U.S. earth station to access a non-U.S. WTO satellite system should not be subject to an ECO-Sat analysis. First, as the Commission has acknowledged in the Further Notice, the WTO Basic Telecom Agreement will provide market access for satellite systems in the countries that signed the Agreement. Further Notice at ¶ 16. Notwithstanding the deferments and limitations in some countries, this is a significant step towards creating a global competitive environment for satellite services. Id. at ¶ 17. Such opening of satellite services markets worldwide will render the time-consuming and complicated ECO-Sat analysis proposed by the Commission in its DISCO II Notice unnecessary.

Moreover, the ECO-Sat test as proposed by the FCC would not be compatible with the WTO Basic Telecom Agreement. The element of reciprocity contained in the ECO-Sat test would violate the market access commitment in the United States' Schedule of Commitments as well as central GATS principles. Therefore, a reciprocity-based ECO-Sat examination may not be adopted in the United States for satellite systems licensed in WTO member countries.

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[1] Satellite service market in the licensing or coordinating adminstration. DISCO II Notice at ¶ 22.

III. THE FCC SHOULD ADOPT AN UNRESTRICTED OPEN ENTRY POLICY FOR NON-U.S. WTO SATELLITE SYSTEMS

The Commission proposes in the Further Notice that a request by a non-U.S. WTO satellite system shall be processed in a streamlined manner unless an opposing party demonstrates that granting the request "would pose a very high risk to competition in the United States satellite market that could not be addressed by conditions that [the Commission] could impose on the authorization." Further Notice at ¶ 13. Thereby, the Commission proposes to adopt a rebuttable presumption under which non-U.S. WTO satellite systems would be granted access to the U.S. satellite market unless they create a very high risk to the competitive environment in this market.

Satellite systems licensed by non-WTO member countries ("non-WTO satellite systems"), on the other hand, would be subject to an ECO-Sat analysis of their home markets, regardless whether their route markets are WTO member countries. Id. at ¶ 22. The Commission suggests a separate ECO-Sat analysis when the route market is a different non-WTO member country. Id. Finally, the ECO-Sat test would be applied to all requests by non-U.S. satellite systems wishing to provide services covered by the Most Favored Nation ("MFN") exemption contained in the United States' Schedule of Commitments.[2] Id. at ¶ 21.

DT opposes the Commission's proposal to introduce a rebuttable presumption for market access by non-U.S. WTO satellite systems. This concept is inherently vague and incompatible with the GATS and with the United States' Schedule of Commitments to the WTO Basic Telecom Agreement. With regard to the exemption taken by the United States for certain one-way satellite transmissions, DT would like to point out that the Further Notice lacks any explanation as to how market access to the United States can be granted to those satellites providing both telecommunications and DTH-DBS services.

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[2] The exemption covers Direct-to-Home Fixed-Satellite Service ("DTH-FSS"), Direct Broadcast Satellite Service ("DBS"), and Digital Audio Radio Service ("DARS").

A. The FCC's Proposed Rebuttable Presumption is Inherently Vague

DT strongly objects to the idea that a third party should be allowed to demonstrate that granting an application for access of a non-U.S. WTO satellite system would result in "a very high risk to competition in the United States satellite market." First, the term "very high risk to competition" does not offer a discernible standard. The Commission does not provide any explanation as to what behavior would constitute a risk high enough to deny market access. Neither does the Commission list the factors that would be considered in determining when a "very high risk" exists.

Consequently, a non-U.S. WTO satellite system operator would be unable to determine its chances of gaining access to the U.S. satellite market. This uncertainty regarding access to the world's largest telecommunications market would, in turn, have a significant impact on the operator's financing and planning. The investments necessary in the satellite industry require certainty with regard to the accessible market even more than other sectors of the telecommunications industry. Without certainty about the accessible markets, a satellite operator might not be able to secure investment for new operations. Thus, the Commission's proposal would ultimately reduce competition instead of advancing it.

Also, the vagueness and the lack of transparency inherent in such a standard create the distinct possibility that elements of the ECO-Sat test will be introduced when assessing applications to access non-U.S. WTO satellite systems. The close similarity between consideration of an operator's competitive situation in general and an "effective competitive opportunities" test may lead to the introduction of ECO-Sat factors into the assessment of these applications. However, since such a reciprocity-based test would not be compatible with the WTO Basic Telecom Agreement, DT would like to urge the Commission to clarify the market access conditions for non-U.S. WTO satellite operators under the WTO Basic Telecom Agreement. The signatories of this Agreement deserve an implementation in the United States that leaves no room for violations.

B. GATS Principles

The "risk for competition" approach proposed by the FCC for non-U.S. WTO satellite systems would violate the principles adopted in the WTO Basic Telecom Agreement. As shown by DT in its comments to the FCC's Notice of Proposed Rulemaking on foreign participation in the U.S. telecommunications market (IB Docket No. 97-142), GATS Articles II, XVI, and XVII require the United States to grant unrestricted market access to telecommunications carriers from WTO member countries. Since the GATS and the WTO Basic Telecom Agreement focus on services and do not distinguish between transmission technologies, the same is true for access to satellite services providers from WTO member countries.

Article II of the GATS requires the United States to provide most-favored-nation treatment to satellite systems from WTO Member Countries. Therefore, the FCC may not grant market access to a satellite system from one WTO member country and refuse market access to a "like" system from another. However, this is exactly what the FCC proposes by tying market access to the effects on competition that the proposed market entry will have.

To assess the ability of a non-U.S. WTO satellite system to distort competition in the U.S. satellite market, the FCC will have to consider both its home and route markets, since these are the markets in which the non-U.S. WTO satellite system will be operating at the time of the application. Therefore, these will be the only markets in which the non-U.S. WTO satellite system will have a position strong enough to distort competition in the U.S. satellite market.

However, the competitive situation in a satellite system's home or route markets is not a factor that makes satellite systems "like" or "unlike" under the GATS. Rather, a "likeness" between satellite systems from different WTO member countries has to be determined by firm and easily applied criteria, such as technical specifications or the services provided. Thus, the Commission's proposal is not in accordance with Article II of the GATS.

Further, Article XVI of the GATS requires the United States to grant market access to non-U.S. WTO satellite systems as provided in its Schedule of Commitments. The U.S. Schedule does not mention a rebuttable presumption for market access for non-U.S. WTO satellite systems. On the contrary, the United States committed to granting market access to non-U.S. WTO satellite systems with the only exceptions of DTH-FSS, DBC, and DARS. A reservation of market access in case a third party demonstrates "a very high risk to competition" is not contained in the U.S. Schedule of Commitments. Therefore, the procedure suggested by the Commission does not comply with the WTO Basic Telecom Agreement and Article XVI of the GATS.

Finally, Article XVII of the GATS requires the United States to treat non-U.S. WTO satellite systems no less favorably than it does U.S. satellite systems. The Further Notice does not imply that the Commission intends to adopt market entry barriers for U.S. satellite systems that "pose a very high risk to competition." Non-U.S. WTO satellite systems, on the other hand, will face a lengthy and cumbersome examination of the impact their entry into the U.S. satellite market will have on competition in this market. Even when this examination does not confirm a risk to competition in the U.S. satellite market, the procedure itself will have taken up valuable time and resources of the non-U.S. WTO satellite operator and may, in some cases, deter an operator from attempting to enter the U.S. market at all. Consequently, in yet another way, the Commission's proposal will have the exact effect it allegedly tries to prevent - namely, a decrease of competition in the U.S. satellite market.

IV. THE FCC SHOULD HARMONIZE THE TREATMENT OF U.S. SATELLITE SYSTEMS AND NON-U.S. WTO SATELLITE SYSTEMS REGARDING SERVICE TO NON-WTO MEMBER MARKETS

In the Further Notice, the Commission asks for comments on whether the ECO-Sat Test should be applied to non-WTO markets served by non-U.S. WTO satellite systems.

Further Notice at ¶ 25. In this context, the Commission points out that U.S. licensed satellite systems may provide service to any country without further authorization by the Commission. Id. at ¶ 26. However, under the WTO Basic Telecom Agreement, the United States made a commitment to grant national treatment to satellite systems licensed in WTO member countries. Therefore, the Commission asks whether an ECO-Sat test should be applied to both U.S. and non-U.S. WTO satellite systems serving non-WTO markets. Id. Alternatively, the Commission proposes to not apply an ECO-Sat test to non-U.S. WTO satellite systems regardless whether they serve non-WTO markets. Id. at ¶ 27.

DT strongly suggests granting non-U.S. WTO satellites the same flexibility that U.S. satellites are enjoying today. DT agrees with the Commission that under the WTO Basic Telecom Agreement it is necessary to harmonize treatment of U.S. licensed satellites and satellites licensed in WTO member countries. However, adopting an ECO-Sat test for satellites serving non-WTO markets would only serve to create additional administrative procedures and, thus, undermine the WTO's goal to open the global satellite market and to increase competition. Conversely, competition will develop and grow only when administrative hurdles become smaller and fewer.

V. INTERGOVERNMENTAL ORGANIZATIONS ("IGOs") AND THEIR FUTURE AFFILIATES

A. The FCC Should Recognize the Commitments Made By IGO Members in the Course of the WTO Basic Telecom Negotiations

As far as Intergovernmental Satellite Organizations are concerned, the Commission states that they do not profit from the WTO Basic Telecom Agreement because, based upon their intergovernmental, treaty-based status, they cannot be considered WTO satellite systems. Further Notice at ¶ 32. However, the Commission recognizes that many of the IGO signatories have committed in the WTO Basic Telecom Agreement to open their markets.

Therefore, the Commission refers to its proposal in the DISCO II Notice under which market access for IGOs depends on the openness of the route markets served by the IGO. DISCO II Notice at ¶ 66. Alternatively, market access depends on the total investment share of member governments with open home markets or on a determination that granting access to an IGO would not distort competition in the United States. Id. at ¶ 67, 68.

DT strongly objects to the Commission's suggestion that market access for IGOs should be based on the openness of all of their route markets or, at least, of all of their members' home markets. Implementing this proposal would mean that the Commission would deny market access to an IGO if only one of its route markets or one of its members' home markets is not open. In addition to the fact that examining the openness of all of these different markets would greatly exceed the FCC's resources, the Commission would ignore the commitments made by many of the IGO member countries in the course of the WTO Basic Telecom Agreement. Also, the Commission would thwart any effort to achieve further market-opening commitments from IGO members if these commitments are not accompanied by an opening of the U.S. market.

DT also has concerns regarding the "critical mass" approach the Commission proposes as an alternative to the "open market" approach. The comments and reply comments to the FCC's DISCO II Notice have shown that there is a widespread controversy over the viability of a "critical mass" approach and over the number of countries or investors that make a "critical mass."[3] Therefore, it seems unlikely that the FCC will be able to determine a "critical mass" of countries or investors that actually reflects the IGO member countries' commitments under the WTO Basic Telecom Agreement.

Finally, DT would like to point out that in the United States the INTELSAT signatory, Comsat, still has a monopoly for access to INTELSAT capacity. In Germany, on the other hand, DT grants open access to the INTELSAT space segment. Although the United States

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[3] See, e.g. Reply Comments of ICO Global Communications, at p. 9.

has reserved the Comsat monopoly in its Schedule of Commitments, the FCC should consider the impression given by the retention of a monopoly for access to an IGO on one hand and the refusal of market access to IGO members on the other. At the very least, the FCC contradicts its own competitive credo if it examines IGO members more critically than it does the U.S. signatory.

B. The FCC Should Not Discriminate Between Future IGO Affiliates and Other Non-U.S. Satellite Systems

The Commission proposes to treat future IGO affiliates the same as any other non-U.S. satellite systems. Further Notice at ¶ 34. However, the Commission proposes, in consideration of what it perceives as the "unique relationship between intergovernmental satellite organizations and their affiliates," a review of an IGO affiliate's relation with its parent to prevent competitive distortions as a result of the licensing of the affiliate. Id. at ¶ 35, 36.

DT would like to point out that future IGO affiliates will be regular satellite operators licensed either in WTO member countries or in non-WTO member countries. The FCC will have to grant the same rights and privileges to the first group as to other non-U.S. WTO satellite systems. Therefore, the Commission may not discriminate against future IGO affiliates by subjecting them to additional tests or examinations that neither U.S. nor non-U.S. WTO satellite systems are subjected to. However, this is exactly what the FCC suggests. The proposed review of an affiliate's relationship with its IGO parent and examination of potential anticompetitive results of the affiliate's entry into the U.S. market would amount to a special proceeding for IGO affiliate. This, however, would constitute a violation of MFN and the National Treatment Clause and would be contrary to the U.S. Schedule of Commitments.

Also, DT wishes to emphasize that the relationship between an IGO and its affiliate is largely determined by the IGO's members themselves. The United States is, for example, a party to INTELSAT and has, as such, the opportunity to influence the relationship between INTELSAT and a future affiliate. Of course, the United States may be unable to realize all of

its goals regarding this relationship. However, the FCC may not base its licensing decisions upon goals not accepted in the privatization process.

Finally, a special proceeding for IGO affiliates would take up significant amounts of time and resources and, thus, create a de facto market entry barrier for the affiliates. Not only would this result violate the WTO Basic Telecom Agreement, it would also cause customers in the United States to lose one potential service provider. Competition in the United States would fail to increase because potential competitors would be effectively excluded from the market. This result is contrary to the express goals of the FCC, namely to promote competition and increase choices for U.S. consumers.

VI. THE FCC SHOULD CONSIDER OTHER PUBLIC INTEREST FACTORS ONLY AS PROVIDED FOR IN THE GATS AGREEMENT

Finally, the Commission suggests that it consider additional public interest factors when determining access to the U.S. market for non-U.S. satellite systems. DISCO II Notice at ¶ 48; Further Notice at ¶ 37. The public interest analysis would include the "significance of the proposed entry to the promotion of competition in the United States and the global satellite service market; issues of national security, law enforcement, foreign policy, and trade." DISCO II Notice at ¶ 48.

At this point, DT wishes to reiterate the concerns already voiced in its comments to the FCC's Notice of Proposed Rulemaking on foreign participation in the U.S. telecommunications market (IB Docket No. 97-142). As far as trade policy is concerned, the United States had the opportunity to introduce its concerns during the WTO Basic Telecom negotiations and/or to reserve corresponding rights in the Schedule of Commitments. The United States may not now, after signing the WTO Basic Telecom Agreement, exclude foreign satellite systems from its satellite market on grounds of trade policy that it failed to include into its Schedule of Commitments.

As far as national security is concerned, the GATS Agreement contains a very specific and narrowly tailored exception under which a WTO member country may act on behalf of its national security. However, even this exception only allows member countries to take action necessary for the protection of "essential security interests: (i) relating to the supply of services [...] for the purpose of provisioning a military establishment; (ii) relating to fissionable and fusionable materials [...]; (iii) taken in time of war or other emergency in international relations[.]" GATS Article XIV bis 1(b). Should the Commission wish to simply refer to these "essential security interests," it is unnecessary to list them as an "other public interest factor" because an exception for these interests is already provided for in the GATS Agreement. However, should the Commission wish to include other, further-reaching national security interests, it would violate the GATS Agreement.

With respect to law enforcement and foreign policy, the Commission may not exclude non-U.S. WTO satellite systems on these grounds because the GATS Agreement does not provide for a corresponding exception. Of course, the general laws of the United States apply to non-U.S. satellite systems as well as to U.S. systems, and they are certainly sufficient to prevent any possible violations of law or foreign policy that might arise from the presence of a non-U.S. satellite system in the U.S. satellite market.

VII. CONCLUSION

The Commission should not adopt the ECO-Sat test for the access of non-U.S. satellite systems licensed in WTO member countries to U.S. earth stations. Neither should the Commission adopt a rebuttable presumption for market access of non-U.S. WTO satellite systems, since such a presumption would be incompatible with the United States' Schedule of Commitments and central GATS principles. Also, the proposed rebuttable presumption does not define the factors the Commission will consider in the case of contested market entry and is, therefore, vague. Finally, the option of a rebuttable presumption would place non-U.S.

operators at the whim of competitors who may significantly delay or even hinder entry into the U.S. market by initiating proceedings before the Commission to rebut the presumption.

With regard to IGOs and their future affiliates, the Commission should take into consideration the significant market opening commitments by many of the IGO members. The Commission should not discriminate between IGO affiliates and other non-U.S. satellite systems.

For the foregoing reasons, DT submits that the FCC should adopt or modify its rules for the market entry of non-U.S. satellite systems as specified herein.

Respectfully submitted,

DEUTSCHE TELEKOM AG and
DEUTSCHE TELEKOM, INC.

Andrea Huber by ABS

By: Andrea Huber
Andrea Huber

Dated: September 5, 1997

Certificate of Service

I, Doris Bailey, do hereby certify that on this 5th day of September, 1997 a copy of the foregoing document was mailed by U.S. first class mail, postage prepaid, to the parties on the attached service list.

/s/ Doris Bailey
Doris Bailey

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